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MAR 13 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1252

MICHAEL YODICE, Petitioner

v.

KONINKLIJKE NEDERLANDSCHE
STOOMBOOT MAATSCHAPPIJ, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 13, 1973

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PETITION FOR WRIT OF
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UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT

The petitioner, MICHAEL YODICE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

The original judgment was entered in this proceeding on November 6, 1972, but was thereafter, on December 13, 1972, modified or nullified - that is, it was, as explained more fully below, either made effective as of December 13, 1972, or was superseded by a new judgment dated and entered December 13, 1972. The opinion was filed December 13, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, as Appendix A.

No opinion was rendered by the United States District Court of the Eastern District of New York, from whose judgment an appeal was taken to the United States Court of Appeals for the Second Circuit.

JURISDICTION

The petition herein, filed March 13, 1973, is timely filed, for the following reasons:

Originally, a judgment - or, possibly, a purported judgment - of the Court of Appeals for the Second Circuit was entered on November 6, 1972, which was, however, thereafter, on December 13, 1972, modified or nullified - depending upon the construction given to the events of December 13, 1972 (hereinafter narrated) - in that the judgment was made effective as of December 13, 1972, or was replaced by a new judgment dated and entered December 13, 1972.

A copy of the November 6, 1972 judgment is attached hereto as Exhibit B. (The inclusion in the judgment of

"Universal Terminal & Stevedoring Corp., Third-Party Defendant-Appellee is erroneous, since the action was discontinued against said party prior to the trial which resulted in the judgment appealed from".

The judgment entered November 6, 1972 formalized the action taken by the Court of Appeals for the Second Circuit the same day, when, after hearing argument on the appeal - and as noted in an entry on the docket sheets - the Court affirmed the judgment appealed from in open court, at the same time filing no opinion at that time.

Subsequently, however, the Court, for reasons stated following this sentence, apparently recognized - and we say this with the utmost deference - that

its action in affirming in open court, at the same time filing no opinion, and entering a judgment embodying and formalizing that action, was, because of the nature and grounds of the appeal, of doubtful validity, if not entirely void for want of power and jurisdiction, in that, because of the said nature and grounds of the appeal, the Court was required to file an opinion, and could not properly enter a judgment before doing so, as indicated by the fact that thereafter, on December 13, 1972, the Court filed an opinion, the heading of which states that the appeal was "Submitted November 6, 1972 Decided December 13, 1972" (Appendix A), the Court, by said action, either making the judgment entered November 6, 1972 effective as of December 13, 1972, or newly - as of December 31, 1972 -

ordering, adjudging and decreeing that the judgment appealed from be affirmed.

We proceed to document the foregoing: Petitioner had - as the opinion of the Court of Appeals for the Second Circuit (Appendix A) makes clear - appealed to that Court from the judgment of the District Court of the Eastern District of New York on the ground of the inadequacy of the judgment (entered on a jury verdict), more particularly contending that the District Court had abused its discretion in denying petitioner's motion to set the verdict aside as inadequate, and to order a new trial, both on the ground of the inadequacy of the verdict.

In view of the ground of the appeal, set forth above, the Court of

Appeals for the Second Circuit, as it acknowledged in its opinion (Appendix A), was required, in deciding the appeal, to make a detailed appraisal of the evidence bearing on damages (Grunenthal v. Long Island R.R. Co., 393 U.S. 156, 159; 1968), the principles of which case (dealing with an allegedly excessive verdict) apply equally to allegedly inadequate verdicts, as the Court of Appeals acknowledged (Appendix A). Naturally, a detailed appraisal of the evidence can be made only in an opinion.

Thus, it appears that when the Court of Appeals for the Second Circuit affirmed the judgment appealed from in open court, at the same time rendering no opinion, and entering a judgment embodying its action, it proceeded, it is

respectfully submitted, without power or jurisdiction so to do.

Evidently belatedly recognizing the foregoing facts, the Court of Appeals for the Second Circuit thereafter, on December 13, 1972, filed an opinion - the heading of which, as indicated, states that the appeal was submitted November 6, 1972 and decided December 13, 1972 - in which it made references to the evidence bearing on damages (although not in the detail mandated by Grunenthal v. Long Island R. R. Co., supra, as explicated in West v. Jutras, 456 F. 2d 1222, 1225; 2 Cir; 1972).

In any event, from all the foregoing, it appears that the Court of Appeals did not actually decide the appeal until December 13, 1972, at which time it either

made the judgment entered November 6, 1972 effective as of December 13, 1972, or newly - as of December 13, 1972 - ordered, adjudged and decreed that the judgment appealed from be affirmed.

Thus, it follows that the judgment of the Court of Appeals for the Second Circuit was, to all intents and purposes, actually in effect entered on December 13, 1972. This petition for a writ of certiorari was filed within 90 days of that date.

The Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1) and 2101 (c).

QUESTIONS PRESENTED

(1) Is the judgment of the Court of Appeals for the Second Circuit in conflict with the holding in Grunenthal v. Long Island R.R. Co., supra, 393 U.S. 156, 159, requiring that in a case of this kind, the Court of Appeals must make a detailed appraisal of the evidence bearing on damages, in that the references to the evidence bearing on damages contained in the opinion of the Court do not constitute the required detailed appraisal, in view of the fragmentary, perfunctory, conclusory and inaccurate, as well as baseless, nature of said references? - particularly in the light of the fact that a proper detailed appraisal of the evidence bearing on damages would necessarily lead to the conclusion that the verdict was not in

accordance with the undisputed evidence of plaintiff's damages, and that, therefore, the District Court abused its discretion in refusing to set aside the verdict as inadequate, and order a new trial on the question of damages (the trial itself having been restricted only to said question)?

(2) Is the judgment of the Court of Appeals for the Second Circuit in conflict with the holding in Grunenthal v. Long Island R.R. Co., supra, 393 U.S. 156, 159, requiring that in a case of this kind, the Court of Appeals must make a detailed appraisal of the evidence bearing on damages, in that the opinion of the Court makes no reference to - let alone considers - the serious errors, highly prejudicial to petitioner, which the District Court committed (all

advanced by petitioner in his briefs on appeal), which could be said to be responsible for the inadequacy of the verdict, the errors consisting, first, in the fact that the District Court permitted appellee's counsel, over petitioner's objection, to cross-examine petitioner as to (a) other accidents and injuries sustained by petitioner prior to the accident and injuries at bar, but unrelated to same, and (b) claims and suits made by petitioner against appellee - on whose ships these other accidents took place - based on said other accidents and injuries; secondly, the Court's permitting appellee's counsel, over petitioner's objections, to read into evidence the testimony of an expert medical witness, which had been given on behalf of peti-

tioner at an earlier trial, the witness not having been called by petitioner at the second trial, and his testimony containing portions which might be construed by the jury as being adverse to his claims; third, appellee's counsel, in violation of a previous ruling by the District Court, stated, in the presence and hearing of the jury, that a medical expert (not the witness previously referred to), who had testified for petitioner at the earlier trial, and whom appellee called as a witness at the second trial, had not been called by petitioner because the latter's counsel declined to call him, petitioner's counsel objecting the statement, and the Court doing nothing beyond saying, "Let the objection be made", without, however, giving the jury any curative instructions;

and fourth, the Court's permitting said medical expert, over petitioner's objections, to be called as a witness, and permitting appellee's counsel to read portions of his testimony at the former trial which could be construed by the jury as being adverse to petitioner's claims?

THE REGULATIONS WHICH THE CASE INVOLVES

The case involves Rule 26 (4) of the Federal Rules of Civil Procedure. The text of same is set out in Appendix C.

STATEMENT OF THE CASE

The action - based on diversity of citizenship (28 U.S.C., sec. 1332a(1)) - was brought by petitioner, as plaintiff, against respondent, as defendant in the United States District Court for the Eastern District of New York, for damages sustained by him as a result of the negligence of respondent, and the unseaworthiness of the ship on which plaintiff, a longshoreman, was working and was injured.

On March 17, 1968, petitioner was injured when, while he and another longshoreman were pulling on a rope, in order to open and expand a rain tent - it was raining at the time - the rope parted, propelling petitioner backwards (14, 15, 237, 239; numbers, unless other-

wise indicated, refer to pages of the transcript of the second trial), his head striking the "jack-knift lock" on the coaming of the hatch, his neck hitting a covering for pipes, and his left shoulder striking the "rib" of the ship (14-15; record on appeal taken by appellee, as appellant, from verdict for petitioner at first trial, doc. 21, pp. 11, 14, 40-41; doc. 22, pp. 5-6, 17-18).*

For his ensuing injuries and damages - referred to more fully below - petitioner was, on the first trial, awarded $15,000.00 by the jury. The judgment based upon said verdict, however,

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*No evidence as to the details of the accident was offered at the second trial, the latter being restricted to the issue of damages only.

was reversed - on an appeal taken by appellee herein, as appellant - and a new trial ordered, limited to the issue of damages. (Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij, 443 F. 2d 76 (2d Cir. 1971)). (The new trial was ordered only because the District Court had failed, after requests by the appellee herein, as defendant, to give certain jury instructions concerning damages; ibid, and see also opinion of Court of Appeals, Appendix A).

On the new trial, petitioner was awarded $1,500.00 only by the jury (Appendix A). This award was made notwithstanding the following undisputed evidence of petitioner's injuries and damages:

All of what follows was supported by evidence given by the petitioner and by his medical experts:

(1) Petitioner _ who was 58 at the time of the accident (58), and had, at that time, an occupational expectancy of 65, or seven more years, and a life expectance of 75, or 17 more years (transcript of October 29, 1971, p. 56) _ has, as a result of the accident, a 25% loss or use of function of the cervical spine or neck, which is permanent in nature (petitioner's main brief on the appeal, pp. 34_36). The evidence as to this was not effectively controverted (ibid, pp. 20-30).

(2) Petitioner, also as a result of the accident, also has a 25%

loss of use or function of the left shoulder, which is permanent in character (petitioner's main brief on the appeal, pp. 34-36). The evidence as to this was also not effectively controverted, and, in fact, respondent's medical expert conceded an 8% loss of use or function of the left shoulder (petitioner's main brief on the appeal, pp. 34-36, with 20-30).

(3) Petitioner, as a result of the accident - in which his head, as noted, struck the "jack-knife" lock on the coaming of the hatch, and was cut, with accompanying bleeding, in two different places, so as to require suturing (petitioner's main brief on the appeal, pp. 5,6) - suffers from painful headaches, which are permanent in nature (petitioner's main brief on the appeal, p.34). The evidence as to

this was not effectively controverted.

(4) Petitioner, at the time of the trial- October 1971 - had suffered for 3 1/2 years (from the day of the accident, March 17, 1968), from pain in the cervical spine or neck (petitioner's main brief on the appeal, pp. 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 19, with 18, 20-30). The evidence as to this was not effectively controverted.

(5) Petitioner, at the time of the trial - October 1971 - had suffered for 3 1/2 years (from the day of the accident, March 17, 1968) from pain in the left should (petitioner's main brief on the appeal, pp. 5, 6, 7, 8, 9, 14, 15, 16, 17, 19, with 18, 20-30). The evidence as to this was not effectively controverted.

(6) Petitioner, at the time of the trial - October 1971 _ had

suffered for 3 1/2 years from the day of the accident, March 17, 1968) from painful headaches (petitioner's main brief on the appeal, pp. 5, 6, 7, 8, 9, 18, 19, 20-30). The evidence as to this was not effectively controverted.

(7) Petitioner - who was 58 at the time of the accident (petitioner's main brief on the appeal, p. 3), and had a life expectancy from that time of 17 years (transcript of October 29, 1971, p. 56) - would continue, during those 17 years,to suffer pain in the cervical spine or neck (petitioner's main brief on the appeal, pp. 17_18).

(8) Petitioner _ who was 58 at the time of the accident, and then had a life expectancy of 17 years - would, during those 17 years, continue to suffer pain in the left should (petitioner's main brief on the appeal, pp. 17, 18).

(9) Petitioner - who was 58 at the time of the accident, and then had a life expectancy of 17 years - would, during those 17 years, continue to suffer from painful headaches (petitioner's main brief on the appeal, pp. 19-20).

(10) As of the time of the trial, petitioner had lost wages aggregating some $7,500.00 (petitioner's main brief, pp. 7-10); petitioner's exhibits 1, 1A and 3, in evidence, see volume of exhibits; also petitioner's main brief on the appeal, pp. 11-13).

(11) Petitioner had, during the 3 1/2 years between the time of the accident and the time of the trial, and as a result of the accident, and his ensuing injuries, lost 245 to 248 days

representing losses of earnings aggregating some $7,500.00 (respondent's main brief on the appeal, p. 36). Petitioner was 58 at the time of the accident, and had, at that time, an occupational expectancy of 7 more years, or until 65 (petitioner's main brief on the appeal, p. 34). The trial court charged, without objection or exception, that petitioner - who, as already noted, had, during a period of time (3 1/2 years), representing one-half of his remaining expectancy of 7 years, and as a result of the accident and his ensuing injuries, lost 245 to 248 days, representing loss of earnings aggregating $7,500.00 (petitioner's main brief on the appeal, p. 36) - was entitled to

recover for future loss of income (transcript of October 29, 1971, pp. 56, 57).

Following the rendition of the verdict, in favor of petitioner, in the amount of $1,500.00, petitioner- pursuant to Rule 59(a) of the Federal Rules of Civil Procedure - moved to set the verdict aside, and, inferentially, for a new trial, on the ground of the inadequacy of the verdict (transcript of October 29, 1971, p. 62). The District Court, however, denied the motion (id.).

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals, it is respectfully submitted, is in conflict with the holding in Grunenthal v. L.I.R.R. Co., 393 U.S. 156, 159, in that the opinion of the Court, instead of making a detailed appraisal of the evidence bearing on damages, as required by Grunenthal, supra, contains merely references thereto which are, it is respectfully submitted, perfunctory, fragmentary, conclusory, and inaccurate. Cf West v. Jutras, 456 F 2d 1222, 1225 (2 Cir; 1972).

The foregoing is readily documented: First, in view of the

facts set forth under "STATEMENT", supra, it is incontrovertible in view of the undisputed nature of the evidence as to petitioner's injuries and damages, (a) that the verdict of $1,500.00 not only was and is without support in the evidence, but was and is, in fact, thoroughly incompatible with the evidence _ more particularly, with the undisputed evidence of respondent's damages - so much so as to shock the judicial conscience, and (b) that, therefore, the District Court's refusal to set the verdict aside and grant a new trial on the ground, of the inadequacy of the verdict, constituted, it is respect-

fully submitted, an abuse of discretion - and thus reversible error - so that it would be an egregious denial and miscarriage of justice to permit it to stand. Dagnello v. L.I.R.R. Co., 289 F 2d 797, 806 (2 Cir. 1961), involving the Court's refusal to set aside an allegedly excessive verdict, the principles of which cases, however, also apply to refusal to set aside an allegedly inadequate verdict. Caskey v. Village of Wayland, 375, F 2d 1004, 1008 (2 Cir. 1967), and see discussion, Appendix A; Caskey, supra, at p. 1007 of 375 F 2d, quoting Dimick v. Schiedt, 293 U.S. 474, 486, to the following effect.

"Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand."

To the same effect, see:

West v. Jutras, 456 F 2d 1222, 1225 (2 Cir. 1972), citing Dagnello, at p. 1007.

Grunenthal v. L.I.R.R. Co., 393 U.S. 156, 159; 1968, cited West v. Jutras, p. 1008 of 456 F 2d.

The opinion of the Court of Appeals, it is respectfully submitted, does not make the detailed appraisal of the evidence bearing on damages, mandated by Grunenthal, supra

First, the reference in the opinion to the conflict in the testimony of the medical experts gives no details. Secondly, there is no basis for the statement of the opinion that the jury could have either discredited petitioner's testimony about the disabling pain of hishead injury, or found a lack of causal connection with the accident. The evidence was clear that petitioner's pain from any prior head injury had ceased long prior to the accident in question; and his medical expert testified that the head injury he received in the accident in question was the competent producing cause of his headaches, and that they were permanent in nature.

Third, with respect to the records of the Waterfront Commission concerning petitioner's absences, referred to in the opinion, suffice it to say that the credibility of these records was utterly destroyed when it was shown that they had petitioner working on the three days of the first trial, when, admittedly, he was in the courtroom at all times on those days.

Fourth, comparison of the opinion of the Court of Appeals with its opinion in the case of West v. Jutras, 456 F 2d 1222 (1972), supra, in which the Court made the detailed appraisal of the evidence bearing on damages, required by Grunenthal, supra

amply establishes that the opinion of the Court of Appeals in the case at bar does not make the required detailed appraisal of the evidence bearing on damages, and that the references to the evidence in the opinion are perfunctory, fragmentary, conclusory and inaccurate in nature.

For the foregoing reasons, the judgment of the Court of Appeals is, it is respectfully submitted, in conflict with the holding of this Court in Gruenthal, supra.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

IRVING B. BUSHLOW
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Brooklyn, New York
11249

Counsel for Petitioner

March 13, 1973

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - -

No. 73-September Term, 1972.

(Submitted November 6, 1972 Decided December 13, 1972.)

Docket No. 72-1049

- - - - - - - - - - - - - - - - - -

MICHAEL YODICE,

Plaintiff-Appellant,

-against-

KONINKLIJKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPIJ,

Defendant-Appellee.

- - - - - - - - - - - - - - - - - -

B e f o r e :

FRIENDLY, Chief Judge,

MANSFIELD and TIMBERS, Circuit Judges.

- - - - - - - - - - - - - -

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying plaintiff's motion for a new trial on the ground that the verdict of $1,500 was inadequate.

Affirmed.

- - - - - - - - - - - - - - - -

IRVING B. BUSHLOW, Esq., Brooklyn, N.Y., for Plaintiff-Appellant.

WILLIAM M. KIMBALL, Esq., New York, N.Y., (Burlingham Underwood & Lord), for Defendant-Appelle.

- - - - - - - - - - - - - - - - -

PER CURIAM:

This is the second appeal from a jury verdict in this longshoreman's personal injury suit. On the former appeal, which was by the defendant from a verdict for $15,000, Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij, 443 F.2d 76 (2d Cir. 1971), we ordered a new trial on the issue of damages only because the trial court had failed, after requests by the defendant, to give certain jury instructions concerning damages. On the trial which followed these instructions were incorporated in the charge in the charge to the jury, which rendered a verdict of $1,500.[1] This time appellant

1 Prior to the trial the action of the defendant Koninklijke against the former third-party defendant Universal Terminal & Stevedoring Corporation was discontinued with prejudice by stipulation of all the parties.

Yodice asks us to set aside the verdict in his favor on the ground of inadequacy. We affirm.

We note at the outset that our decision in Dagnello v. Long Island R.R. Co., 289 F.2d 797, 806 (2d Cir. 1961), dispelled any doubt about our "power to review the order of a trial judge refusing to set aside a verdict as excessive...", or, by parity of reasoning, as inadequate. See generally, 6A J. Moore, Federal Practice ¶59.08(6) at 3824, et seq. (2d ed. 1971). Dagnello established a standard of review which allowed the Court of Appeals to overturn the trial judge's denial of a new trial for excessiveness of the verdict only where "the amount is so high that it would be a denial of jus-

tice to permit it to stand," and hence, "an abuse of discretion," giving the "benefit of every doubt to the judgment of the trial judge." 289 F.2d at 806. Although not deciding the point because it was unnecessary to do so, we observed in Caskey v. Village of Wayland, 375 F.2d 1004, 1008 (2d Cir. 1967), that there did not seem to be "any sound rationale for formulating standards to be applied when a verdict is challenged as inadequate which would differ from those utilized upon a challenge for excessiveness." We adhere to that observation.

Applying the Dagnello standard, after making a "detailed appraisal of the evidence bearing on damages," Grunenthal v. Long Island R.R. Co., 393 U.S. 156, 159

(1968), we find no abuse of discretion on the part of Judge Weinstein in denying the motion for a new trial in this case. Although appellant claims that the verdict was less than the damages actually incurred and proven by undisputed evidence, a situation which should result in a new trial as to damages, see, e.g., Devine v. Patteson, 242 F.2d 828, 832 (6th Cir.), cert. denied, 355 U.S. 821 (1957); Centrowitz v. Texaco, Inc., 49 F.R.D. 142 (S.D.N.Y. 1969), the record indicates that, to the contrary, the jury could properly have chosen to believe from the controverted proofs offered at trial that appellant's damages were limited to the $1,500 sum it awarded. Additional amounts, which appellant asserts

should have been awarded as damages, could appropriately have been rejected on the grounds that the jury gave more credence to the appellee's medical experts than to appellant or his experts and that appellant had in its view failed to prove sufficiently that days on which he was idle and hence lost wages did not result from the accident for which appellee was held liable.

We need not speculate on what basis the jury reached the amount of its verdict. Our task is simply to determine whether appellant was wrongfully denied recovery for damages proven and undisputed. This we do not find. It was stipulated by the parties that medical expenses resulting from the injuries suffer-

ed by appellant when he fell backwards against a part of the ship while rigging a rain tent on appellee's vessel amounted to $201.50. Evidence presented by appellant also indicated, without real contradiction, that as a result of the accident he was out of work for about two months from mid-March to mid-May 1968. The testimony of Victor Tartagliune, a representative of the Guarantee Department of the New York Shipping Association leaves somewhat ambiguous whether the hourly wage for a longshoreman in Yodice capacity was $3.62 or 8% less, but viewing the testimony most favorably to appellant, an absence of nine weeks at 40 hours per week would have resulted in a loss of $1,303.20. The total verdict of

$1,500 covered these essentially uncontroverted losses.

The record does not support appellant's claim that proof of greater losses (due to general pain and suffering, physical impairment, and sporadic loss of work resulting from periodic occurrences of disabling pain) was not "effectively controverted" by appellee. There was a sharp conflict in the testimony of the medical experts, including proof from which the jury could reasonably have concluded that appellant's physical condition was not worsened in a way that would cause a diminution of future earning capacity. Appellant had suffered injuries of the head in previous accidents, and the jury could have either discredited his testimony

about the disabling pain of this one or found a lack of causal connection with the accident in question. Finally, though some testimony by Mr. Tartagliune might have supported a claim of lost time beyond the immediate post-accident period there was considerable amibiguity concerning the number of days actually missed by appellant and the reasons there for, as well as the consequences thereof. Appellant was covered by the International Longshoremen's Association's (ILA) guaranteed annual income plan which insured against a lack of work available to longshoremen. The jury could have found that the testimony concerning the operation of the plan in appellant's case failed to support directly the loss of

time claimed by appellant or to link his absences to the accident. Moreover, appellee presented countervailing evidence in the form of the Waterfront Commission's validation report of Yodice's work history which indicated far fewer absences than did the ILA records.

Under these circumstances, and where the charge to the jury was sufficient, we cannot say that the jury refused to award any damages that could properly be labelled as undisputed. We have examined appellant's other contentions and find them to be without merit.

Affirmed.

APPENDIX B

JUDGMENT ENTERED NOVEMBER 6, 1972, BUT MODIFIED OR NULLIFIED ON DECEMBER 13, 1972, SO AS EITHER (a) TO MAKE THE JUDGMENT EFFECTIVE AS OF DECEMBER 13, 1972, OR (b) NEWLY - AS OF DECEMBER 13, 1972 - TO ORDER, ADJUDGED AND DECREED THAT THE JUDGMENT APPEALED FROM BE AFFIRMED

(SEE APPENDIX A)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

- - - - - - - - - - - - - - - - - -

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the

sixth day of November one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,

Chief Judge

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. TIMBERS,

Circuit Judges.

- -

Michael Yodice,

Plaintiff-Appellant,

v.

Koninklike Nederlandsche Stoomboot Maatshappij, N.V.,

Defendant and Third-Party Plaintiff-Appellee,

v.

Universal Terminal & Stevedoring Corp.,

Third-Party Defendant-Appellee.

- -

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

APPENDIX C

Not reproduced, due to fact that question presented (2) involving same has not been pressed.